88-904

Supreme Court, U.S.
FILED
NOV 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

JOHNSON MOVING AND STORAGE COMPANY,
Petitioner

v.

EDWARD H. DANIELS,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT FOR THE STATE OF COLORADO

Lynn W. Tbedte,
Michael J. Boryla,
GRAFT, THOMSON AND TOEDTE, P.C.
7430 East Caley Avenue
Suite 300
Englewood, Colorado 80111
(303) 773-8881

Attorneys for Petitioner

20pp

QUESTIONS PRESENTED

I. Whether the Interstate Commerce Commission Regulation Ex Parte No. 311 requiring motor carriers to roll-in surcharges in their rate structure to compensate owner/operator truck drivers for increased fuel costs, entitled the owner/operator to the full amount of the surcharge as additional compensation; or was the owner/operator limited to extra compensation for added fuel costs based on miles driven.

II. Whether the lower court allowed double recovery by determining the plaintiff's entitlement to the full amount of the fuel surcharge as mandated by Ex Parte No. 311 and also an increased percentage of total line haul revenue based on the rolled-in surcharge.

Johnson Storage and Moving Company, a Colorado corporation, has no subsidiaries nor parent companies; however, it does have affiliates with United Van Lines, Inc., a Missouri corporation; Johnson Intermodal Systems, Inc., a Colorado corporation; Johnson Storage and Moving Company, Inc., a Wyoming corporation; King Investments, Inc., a Colorado corporation; Johnson Pikes Peak, Inc., a Colorado corporation; Johnsons of Cherry Creek, Inc., a Colorado corporation; and Custom Truck, Inc., a Colorado corporation.

INDEX

Questions Presented i

Table of Citations iii

Opinions Below 1

Jurisdiction 2

Relevant Statutory Provisions 2

Statement of the Case 3

Reason for Granting the Writ 5

I. The Decision Below Conflicts with other Federal Court Decisions.

Conclusion 6

Certificate of Service 7

Appendix A-1

TABLE OF CITATIONS

CASES: Page

Central Forwarding, Inc. v. I.C.C., 698 F.2d 1266(5th Cir. 1983) 5

International Brotherhood of Teamsters, et al v. Dixie Transport Co., et al, 1984 Federal Carriers Cases ¶37,109 (I.C.C. Rev. B. June 20, 1984) 6

OTHER AUTHORITIES:

Regulation Ex Parte No. 311 (Sub - No. 4) "Modification of the Rate Carrier's Fuel Surcharge Program" 46 Fed. Reg. 50070; 54746; 47 F.R. 4689; 365 ICC 311 (decided Oct. 5, 1981) 2,3,4,5,6

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

JOHNSON MOVING AND STORAGE COMPANY,
Petitioner

v.

EDWARD H. DANIELS,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF COLORADO

Petitioner, Johnson Moving and Storage Company respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court for the State of Colorado entered in this matter on August 22, 1988.

OPINIONS BELOW

The October 3, 1985 Findings and Conclusions of the District Court, City and County of Denver, State of Colorado, Honorable Paul A. Markson, Jr. entering judgment in the amount of $10,498.28 against Johnson Moving and Storage Company, is not reported and appears in Appendix at A-1-A-4. The February 25, 1988, Opinion affirming the ruling of Judge Markson, Jr. which Johnson Moving and

Storage Company seeks to have this Court review, is not yet officially reported and appears in the Appendix at A-5-A-6. The August 22, 1988, Order of the Colorado Supreme Court denying the Petition of Writ of Certiorari to the Colorado Court of Appeals appears in the Appendix at A-7.

JURISDICTION

The judgment of the Supreme Court, State of Colorado was entered August 22, 1988 and this petition was filed within ninety (90) days of that date. The statutory provision which confers jurisdiction of this Court to review the judgment of the Supreme Court, State of Colorado by Writ of Certiorari is 28 U.S.C. 1257.

RELEVANT STATUTORY PROVISIONS

Interstate Commerce Commission, Regulation Ex Parte No. 311 (Sub - No. 4), "Modification of the Rate Carrier's Fuel Surcharge Program," 46 Fed. Reg. 50070; 54746; 47 F.R. 4689; 365 ICC 311 (decided October 5, 1981; effective February 12, 1982). The pertinent text of the regulation is set forth as follows:

> "... Option A, in the decision of April 11, 1980, may provide the best answer. A mileage compensation formula resulting in a mandatory cents-per-miles payment by carriers to all owner-operators will be utilized. As described below, this approach would establish a reimbursement mechanism keyed to average owner-operator fuel costs rather than the revenue of a given shipment. The method will be easy to apply. The Commission will publish and otherwise make available a cents-per-mile figure which will reimburse owner-operators for fuel costs in excess of 63.5 cents a gallon."

Regulation Ex Parte No. 311 (page 23-419) provides, in part as follows:

> "Dual Compensation
>
> In the prior decision, we noted that parties may modify leases to provide for 100 percent retention by the carriers of any Ex Parte No. 311 fuel-related rate increases. Carriers establishing rates in the future which will not be subject to a surcharge fold in may minimize dual compensation problems by treating the initial fuel payment to the owner-operator as the equivalent of the fold-in amount and deduct it to calculate gross revenues. Either of the approaches contained in the decision can then be applied to subsequent fuel and non-fuel related increases. A similar procedure may be used if carriers have previously folded in the fuel surcharge."

STATEMENT OF THE CASE

This case presents important issues as to the interpretation of Interstate Commerce Commission ("ICC") Regulation Ex Parte No. 311, Modification of the Motor Carrier Fuel Surcharge Program.

In 1979, the ICC, in response to a nationwide truckers' strike, passed a fuel surcharge regulation. This added tax permitted truckers to recover additional compensation (18% of the total line haul charge) to reimburse themselves for added fuel costs. Several months after the surcharge was initiated, it became clear to the ICC that the surcharge had no real relation to actual fuel costs and adopted another method of compensation, Ex Parte No. 311. The new regulation required household moving companies, including Johnson Moving and Storage Company ("Johnson"), to collect an additional amount of 9.4% from its shippers, which amount was placed in a pool for the payment of a

mileage charge to its drivers. Plaintiff Edward H. Daniels, as a contract hauler with Johnson, was paid under the dictates of Ex Parte No. 311 until his termination in November of 1982.

Following his termination, Mr. Daniels filed suit claiming that his hauling contract with Johnson entitled him to all of the 9.4% collected, plus the mileage allowance. In a second claim, he alleged that the 9.4% should have been added to the total line haul revenue before his portion of the line haul revenue was determined.

Following a trial to the court, judgment was entered awarding Mr. Daniels:

a. 100% of the 9.4% added surcharge tax less what he had already received as a mileage allowance; and

b. the 9.4% surcharge should be added to the amount of the gross revenue before applying Daniels' percentage of 56.35 to the line haul charge.

The Decision of the lower court and the affirmation at the appellate level was erroneous for two reasons. The decision was not in conformity with the intent or purpose of Ex Parte No. 311 and the decision allowed Mr. Daniels double recovery for mileage reimbursement.

Johnson then filed an appeal to the Colorado Court of Appeals. The Colorado Court of Appeals affirmed the claim of Daniels and a Petition for Certiorari was filed in the Supreme Court of the State of Colorado which was denied on August 22, 1988.

REASONS FOR GRANTING THE WRIT

I. The decision below affirming an award of additional mileage conflicts with the mileage reimbursement requirements of Ex Parte No. 311.

Regulation Ex Parte No. 311 provided a reimbursement for owner/operators on a mileage basis. The rate of reimbursement was originally set at 14 per mile and was designed to assure owner/operators compensation for all fuel costs above 63.5 per gallon. This additional compensation was to be paid from the 9.4% collected by the company as an addition to the total line haul revenue.

The decision below allowing Mr. Daniels the total 9.4% of the additional line haul revenue conflicts with the regulation. The intent of the regulation was not to add the 9.4% to the compensation due the owner/operator, but to use said amount to establish a fund to pay drivers for miles driven. Johnson was not required to pay Mr. Daniels the 9.4% and also an additional percentage of the line haul revenue. The ruling of the court requiring this compensation constitutes double recovery.

II. The decision below conflicts with the decision of *Central Forwarding, Inc. v. I.C.C.*

In *Central Forwarding, Inc. v. I.C.C.*, 698 F.2d 1266 (5th Cir. 1983), the Court held that the Interstate Commerce Commission exceeded its statutory authority in promulgating Regulation Ex Parte No. 311. Although the ruling did not have retroactive effect, the Court set aside Regulation Ex Parte No. 311 as enacted by the Interstate Commerce Commission.

III. **The decision below conflicts with the decision of *International Brotherhood of Teamsters, et al v. Dixie Transport Co., et al*.**

In *International Brotherhood of Teamsters, et al v. Dixie Transport Co., et al*, 1984 Federal Carriers Cases, ¶37,109 (I.C.C. Rev. B. June 20, 1984), the review board, in interpreting Ex Parte No. 311, determined that owner/operators were not entitled to the amount of the increase in the line haul revenue (surcharge) which was rolled into the base rate. Rather the owner/operators were only entitled to reim bursement of fuel costs based on miles driven.

CONCLUSION

For the foregoing reasons this Court should grant a Writ of Certiorari to review the issues presented by this Petition.

Respectfully submitted,

Lynn W. Toedte
Michael J. Boryla
GRAFT, THOMSON AND TOEDTE, P.C.
7430 East Caley Avenue
Suite 300
Englewood, Colorado 80111
(303) 773-8881
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that three copies of this Petition for Writ of Certiorari were served by postage prepaid first-class mail on Paul Kram, Esq., counsel for the respondent, on November 17, 1988. I further certify that all parties required to be served have been served.

/s/ Lynn W. Toedte

Lynn W. Toedte
7430 East Caley Avenue
Suite 300
Englewood, Colorado 80111
(303) 773-8881

Attorney for Petitioner
Johnson Moving and Storage Company

IN THE DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

EDWARD H. DANIELS

v.

JOHNSON MOVING AND STORAGE COMPANY

Civil Action No. 84 CV 1143

MEMORANDUM ENTERED: OCTOBER 3, 1985

MARKSON, JR., PAUL A.

A trial to the Court was held July 24, 1985. Following are the Court's Findings of Fact and Conclusions of Law.

1. On January 2, 1981, Plaintiff, a long-haul trucker, and Defendant, an agent of United Van Lines engaged in the cross-country and local moving business, entered into a contract whereby Plaintiff would haul goods for Defendant in exchange for a percentage of the "line haul revenue" generated by Plaintiff and 100% of any "additional tariff items".

2. From January 2, 1981 until April 13, 1982, Plaintiff received an 18% "revenue based fuel surcharge" as mandated by the Interstate Commerce Commission to compensate in dependent contract truckers for their extremely high fuel costs caused by the oil crisis. The fuel surcharge was determined by multiplying 18% times the line haul revenue charge and 100% of it was paid to Plaintiff by Defendant as an additional tariff item.

3. As of April 13, 1982, Regulation Ex Parte No. 311, *Modification of the Motor Carrier Fuel Surcharge Program*

was initiated by the I.C.C. This program changed the existing method of payment to a mileage based method and allowed the shipping companies and their agents to assess the I.C.C.-revenue based fuel surcharge on the line haul revenue paid by the customers.

4. United Van Lines and its agents, including the Defendant, received an authorization from the I.C.C. under Ex Parte No. 311 to assess a 9.4% fuel surcharge on line haul revenues.

5. The Plaintiff's contract with Defendant was ter minated on November 22, 1982. Between April 13, 1982 and November 22, 1982 th Defendant assessed its customers the line haul revenue figure including the 9.4% fuel surcharge. The amount of surcharge on the line haul revenue generated by Plaintiff between these dates is $9,492.98 (gross revenue of $110,000 x 9.4% $9,492.98). The Defendant paid Plaintiff at a rate of 13 per mile during this period or a total of $4,773.02. If the 9.4% assessment is an additional tariff item, Defendant owes Plaintiff 100% of all additional tariff items of $9,492.98 less $4,773.02.

6. The I.C.C. recognized that its new fuel reimburse ment plan might have the effect of double reimbursement for independent contract truckers who, as the Plaintiff, were paid under percentage-or-revenue contracts and suggested modifica tion of such contracts. United Van Lines instructed all of its agents, including the Defendant, to consider modifying their independent contract trucker contract to implement Ex Parte No. 311's provisions. The Defendant took no steps whatever to modify its contract with Plaintiff. It instead unilaterally reduced Plaintiff's

compensation by "backing-out" the surcharge from Plaintiff's total line haul revenue prior to determining Plaintiff's percentage of line haul revenue compensation.

7. Between April 13, 1982 and November 22, 1982, Plaintiff generated a total line haul revenue of $110,511.97 and his contractual share of the line haul revenue was $64,444.77. The Defendant, however, "backed-out" the fuel surcharge under Ex Parte No. 311 prior to figuring the Plain tiff's percentage of line haul revenue. Accordingly, Plain tiff was only paid $58,666.45.

8. Pursuant to paragraph XVIII (b) of the contract, Plaintiff's compensation could not be reduced without his written consent. He gave no written consent and did complain prior to his termination that he was not receiving total compensation.

9. Paragraph IX of the contract provided for an escrow account paid by Plaintiff and held by Defendant to insure all payments by Plaintiff owed to Defendant. Any excess held by Defendant had to be returned to Plaintiff no later than the date when all paperwork required by Defendant had been sup plied by Plaintiff. Plaintiff supplied a final accounting to Defendant on February 3, 1983 and Defendant sent its final accounting check to Plaintiff on February 16, 1983. Original ly the contract provided for an escrow of $1,000.00; but Defendant, after posting and mailing notice to all drivers, increased the escrow to $2,000.00. Interest pursuant to the contract was to be paid once the escrow account reached the "required sum". Plaintiff was paid $80.00 of interest upon final accounting.

10. Exhibit E is Defendant's tabulation for final account-

ing. With the exception of item /9 (discussed below), Plaintiff did not sustain his burden of establishing that the deductions complained of were unauthorized. On the other hand, Defendant's testimony was more convincing that the deductions made were in fact incurred while the Defendant was employed and were authorized by the contract. With regard to /9, although the Plaintiff had been injured, Defendant had hauls available for the truck and Plaintiff did not make the truck available for use during the period in question.

11. By stipulation, Plaintiff owes Defendant $1,020.00 on Defendant's counterclaim.

Based upon these facts the Court makes the following Conclusions of Law.

1. The 9.4% fuel surcharge mandated by Ex Parte No. 311 was an additional tariff item for which Defendant was liable to Plaintiff at 100% pursuant to the contract. The Plaintiff was paid the minimum 13 a mile figure, but Defen dant breached its contract with Plaintiff by failing to pay the entire amount. Such breach was material, and Plaintiff was damaged in the amount of $4,719.96.

2. In "backing-out" the surcharge from Plaintiff's total line haul revenues prior to determining Plaintiff's percentage of compensation, the Defendant failed to adequately compensate the Plaintiff under the contract. This was a material breach of the contract which damaged Plaintiff in the amount of $5,778.32.

3. The Court is fully cognizant of Defendant's argu ment that the Court's conclusions result in compensation over and above that contemplated by the I.C.C. Such a result,

however, was anticipated by the I.C.C. and United Van Lines, and they took steps to warn Defendant of this eventuality. Defendant ignored these warnings, implemented procedures adopted by the industry under Ex Parte No. 311, but did not modify its percentage-of-revenue contract with Plaintiff thereby reducing Plaintiff's compensation without Plaintiff's written approval.

4. Defendant accurately determined the interest owing on Plaintiff's escrow account. The increase of the escrow from $1,000.00 to $2,000.00, after notice, did not amount to a decrease in Plaintiff's "compensation" as that term is used in paragraph XVIII (b). "Compensation" as that term is used in the contract is the amount of money established by the "com pensation schedule" attached to the contract. The Defendant also accurately calculated the amount of refund due in its final accounting. This was done in a timely manner.

5. Plaintiff owes Defendant $1,020.00 on its counter claim.

Therefore, Judgment will enter for the Plaintiff and against the Defendant on his First and Second Claim For Relief in the sum of $5,778.32 and $4,719.96 respectively. Judgment will enter for the Defendant and against Plaintiff on Plain tiff's Third and Fourth Claims For Relief and for the Defen dant and against the Plaintiff on its Counterclaim for $1,020.00. Setting-off $1,020.00 against the total of $10,498.28, Defendant owes Plaintiff $9,478.28.

COLORADO COURT OF APPEALS

EDWARD H. DANIELS

v.

JOHNSON MOVING AND STORAGE COMPANY

No. 85CA1500

OPINION ENTERED: FEBRUARY 25, 1988

DIVISION II — JUDGEMENT AFFIRMED

Opinion by JUDGE SMITH

Kelly and Metzger, JJ., concur

Defendant, Johnson Moving and Storage Company, appeals the judgment entered in favor of plaintiff, Edward H. Daniels, following trial to the court on plaintiff's breach of contract claim. We affirm.

Here, the findings of fact and conclusions of law made by the court are based on competent evidence and are therefore binding on appeal. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

The court's determination that the fuel surcharge or fuel fold-in was an additional tariff item which the contract required be paid 100 percent to plaintiff is supported by the record. In particular, the fact that defendant continued payment to plaintiff 100 percent of the prior 18 percent "revenue based fuel surcharge" as a tariff item supports this conclusion. Similarly, the contract was only modifiable with the written consent of plaintiff. Therefore, defendant's unilateral act of "backing-out" the fuel surcharge from the line-haul revenue before determining the compensation to

be paid to plaintiff was a material breach. Contrary to defendant's arguments, the I.C.C. recommendations buttress the trial court's findings and conclusions and do not support its contention that it had a lawful excuse for its action.

Accordingly, the judgment is affirmed.

JUDGE KELLY and JUDGE METZGER concur.

IN THE COURT OF APPEALS OF THE STATE OF COLORADO

EDWARD H. DANIELS

v.

JOHNSON MOVING AND STORAGE COMPANY

Case Number 85CA1500

ORDER

Upon consideration of the Petition for Rehearing filed by the Appellant herein, said Petition is hereby DENIED. It is ordered that issuance of the Mandate hereby be, and the same hereby is, stayed to and including 5-23-88, provided that if Petition for Writ of Certiorari is timely filed with the Supreme Court of the State of Colorado, the stay shall remain in effect until disposition of the within cause by the Supreme Court.

BY THE COURT, EN BANC, APRIL 21, 1988.

IN THE SUPREME COURT, STATE OF COLORADO

EDWARD H. DANIELS

v.

JOHNSON MOVING AND STORAGE COMPANY

Case Number 88SC235

ORDER

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of said Court of Appeals,

IT IS FURTHER ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, AUGUST 22, 1988.

pwc:MJB1

Supreme Court, U.S.
FILED
DEC 27 1988
JOSEPH E. SPANIOL, JR.
CLERK

No. 88-904

(2)

In The
Supreme Court of the United States
October Term, 1988

JOHNSON MOVING AND STORAGE COMPANY,
Petitioner,

v.

EDWARD H. DANIELS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT FOR THE STATE OF COLORADO

BRIEF FOR RESPONDENT EDWARD H. DANIELS IN OPPOSITION

PAUL KRAM
MARK A. FROGGE
LAW OFFICES OF PAUL KRAM
3131 South Vaughn Way
Suite 105
Aurora, Colorado 80014
(303) 752-1030
Attorney for Respondent

Of Counsel
IRVIN M. KENT

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

1/18

QUESTIONS PRESENTED*

I. Whether this Court has jurisdiction to grant Petitioner's Petition for a Writ of Certiorari when the lower court's decision was based solely upon the application of state contract law.

II. Whether Petitioner received sufficient warning of the double recovery problem of which it now complains and thereafter refused to follow the recommendations of the Interstate Commerce Commission and United Van Lines on how to avoid such double recovery.

III. Whether the cases cited by Petitioner in its Petition as being in conflict with the lower court's decision in the present case are actually in conflict when such cases were brought based on entirely different claims than those presented in this case and thus were decided on entirely different bases.

---

* Pursuant to Sup. Ct. R. 28.1 Respondent Edward H. Daniels would state that he is a natural person and thus has no subsidiaries or parent corporations.

TABLE OF CONTENTS

	Page
Questions Presented	i
Rule 28.1 Statement	i
Table of Authorities	iii
Relevant Statutory Provisions	1
Statement of the Case	2
Summary of the Argument	5
Argument as to Why the Petition Should be Denied	6
Conclusion	13

TABLE OF AUTHORITIES

Page

CASES:

Black v. Cutter Laboratories, 351 U.S. 292 (1956) 7

Central Forwarding, Inc. v. I.C.C., 698 F.2d 1266 (10th Cir. 1983) 10, 11

Herb v. Pitcairn, 324 U.S. 117 (1945) 6

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Dixie Transport Co., et al., 1984 Federal Carriers Cases, Para. 37,109 (I.C.C. Rev. B. June 30, 1984) 11, 12

Jankovich v. Indiana Toll Road Commission, 379 U.S. 487 (1965) 6

OTHER AUTHORITIES:

Interstate Commerce Commission, Regulation Ex Parte 311 (Sub.-No. 4), *Modification of the Motor Carrier Fuel Surcharge Program*, 46 Fed. Reg. 50070, 365 I.C.C. 311 (decided October 5, 1981; effective February 12, 1982) 1

Interstate Commerce Commission, *The Fuel Surcharge—Some Questions and Answers*, July 1982 2

RELEVANT STATUTORY PROVISIONS

In citing what it considered to be the relevant portions of Interstate Commerce Commission, Regulation Ex Parte 311 (Sub.-No. 4), *Modification of the Motor Carrier Fuel Surcharge Program,* 46 Fed. Reg. 50070, 365 I.C.C. 311 (decided October 5, 1981; effective February 12, 1982) (hereinafter Ex Parte 311), Petitioner Johnson Moving and Storage Company (hereinafter Johnson) failed to include three pertinent sections of Ex Parte 311 that were of paramount importance to the trial court and the Colorado Court of Appeals in reaching their decisions in this case. Those pertinent sections are as follows:

First, Ex Parte 311 states the following:

> "Since owner-operators generally are paid on a percentage of revenue basis, situations could arise where an owner-operator could receive dual compensation—receive fuel compensation under a cents-per-mile payment while receiving a share of both the folded-in surcharge and future fuel-related increases."

Ex parte 311, 46 Fed. Reg. 50072.

Ex Parte 311 further states at 46 Fed. Reg. 50072 that to "prevent dual compensation the parties may modify the lease to provide for 100% retention by the carriers of any Ex Parte 311 fuel-related increases."

Finally, at 46 Fed. Reg. 50072, Ex Parte 311 states that "if the parties have modified their leases to prevent "dual compensation" *as suggested above,* carriers shall provide owner-operators with a copy of Appendix C . . .". Emphasis added.

STATEMENT OF THE CASE

Johnson's Statement of the Case (Petition at 3-4) contains four inaccurate statements that must be corrected. Those inaccuracies are as follows:

1. First, Johnson states that the "new regulation (Ex Parte 311) required household moving companies, including Johnson Moving and Storage Company . . ., to collect an additional amount of 9.4% from its shippers . . .". Petition at 3. The reference to 9.4% in the above quotation is to a surcharge of 9.4% of the line haul revenue that was charged to each of the shippers who hired Johnson during the relevant time period.

The above quotation is inaccurate in that Ex Parte 311 did not require household moving companies to collect an additional amount of 9.4%. The only requirement of Ex Parte 311 was that carriers such as Johnson pay to owner-operators such as Respondent (hereinafter Daniels) a mandatory cents per mile amount. Ex Parte 311, 46 Fed. Reg. 50071.

The 9.4% surcharge was utilized by Johnson to provide the funds to pay the cents per mile amount required by Ex Parte 311. Ex Parte 311 permitted carriers to apply for permission to charge shippers such a surcharge, but did not require them to do so. Ex Parte 311, 46 Fed. Reg. 50073-50074; Interstate Commerce Commission, *The Fuel Surcharge—Some Questions and Answers,* July 1982 (hereinafter the *ICC publication*).

2. Second, Johnson states that Daniels "was paid under the dictates of Ex Parte No. 311 until his termination . . .". Petition at 4. Such statement raises an infer-

ence that the method by which Johnson determined the entire amount of compensation paid to Daniels was dictated by Ex Parte 311. Such is not correct.

The only requirement of Ex Parte 311 was that owner-operators such as Daniels receive at least the mandatory cents per mile amount. Ex Parte 311, 46 Fed. Reg. 50071. Ex Parte 311 was implemented to provide reimbursement for owner-operators for their fuel costs in excess of 63.5 cents per gallon. Ex Parte 311, 46 Fed. Reg. 50071. Ex Parte 311 was not created to affect any other aspect of the compensation that was agreed upon contractually between the carrier and the owner-operator. Ex Parte 311, 46 Fed. Reg. 50073. There was nothing in Ex Parte 311 that prohibited carriers such as Johnson from compensating owner-operators such as Daniels at a rate higher than the required cents per mile figure. The *ICC publication*, question 20 at page 6.

As a result of the provisions of Ex Parte 311, during the time period at issue Daniels was compensated for his fuel costs in excess of 63.5 cents per gallon. Petition at A-2. However, Daniels was not compensated as was required under the independent contractor contract that was in force between Johnson and Daniels at all times pertinent hereto (hereinafter the contract). Such failure by Johnson to abide by the provisions of the contract provided the bases for Daniels' claims against Johnson.

3. Third, Johnson's statement of the claims that Daniels made in his lawsuit (Petition at 4) is inaccurate.

Daniels' first claim against Johnson was that the 9.4% surcharge was an additional tariff item, as such term was defined by the contract. Daniels claimed that, pur-

suant to a provision of the contract that required Johnson to pay to Daniels 100% of all additional tariff items generated by Daniels, Johnson had been required to pay to Daniels 100% of the 9.4% surcharge generated by Daniels. Daniels further claimed that Johnson failed to pay to Daniels 100% of the 9.4% surcharge generated by him. As a result, Daniels was damaged in an amount equal to the difference between the full 9.4% surcharge amount generated by Daniels and percentage of such surcharge amount actually paid by Johnson to Daniels.

Daniels' second claim against Johnson was that the contract required that Daniels receive, as compensation, a stated percentage of the line haul revenue charged to each shipper whose goods were carried by Daniels. The 9.4% surcharge was "rolled-into" or added into the line haul revenue charged to each shipper. Daniels claimed that the 9.4% surcharge was "backed out" or removed from the total line haul revenue figure by Johnson prior to calculating Daniels' compensation, thus reducing the compensation paid to Daniels by Johnson.

Daniels further claimed that the contract required that Daniels had to agree, in writing, to any modification of the contract that acted to reduce his compensation and that no such written agreement was ever entered into. Daniels therefore claimed as damages the difference between the amount that he would have received as compensation had Johnson not backed out the 9.4% surcharge prior to calculating Daniels' compensation and the percentage of the line haul revenue which Daniels actually received. The trial court and the Colorado Court of Appeals found in favor of Daniels on both such claims. Petition at A-4. and A-6 and A-7.

4. Fourth, Johnson states in the first paragraph of its Statement of the Case that "this case presents important issues as to the interpretation of (Ex Parte 311)." Petition at 3. Such is not correct.

Daniels' claims against Johnson were based solely upon Johnson's failure to compensate Daniels as was required by the contract. The trial court's decision was based entirely upon its interpretation of three provisions of the contract. Petition at A-4 and A-5. The Colorado Court of Appeals concurred with the trial court's reasoning. Petition at A-6 and A-7. The trial court found that Daniels' claims could be resolved adequately by application of principles of state contract law and did not require any interpretation of Ex Parte 311.

Finally, Johnson fails to state in its Statement of the Case that Johnson, at all times pertinent hereto, acted as an agent of United Van Lines (hereinafter UVA). Petition at A-1.

SUMMARY OF THE ARGUMENT

This Court has no jurisdiction to render opinions on cases that were decided by state courts when such decisions were based on adequate state grounds. In this case, the trial court reached its decision based upon the application of principles of state contract law. The Court of Appeals affirmed the trial court's decision and the State Supreme Court declined to grant certiorari. Therefore, this Court has no jurisdictional basis to hear Johnson's Petition.

Johnson was warned by the Interstate Commerce Commission and by United Van Lines of the potential for the precise dual compensation problem of which Johnson is now complaining. Johnson was advised that in order to avoid such dual compensation problem with Daniels, Johnson needed to modify its contract with Daniels. This Johnson failed to do.

The cases cited by Johnson in the Petition are not on point and are not in conflict with the decision in the present case. Therefore, the Petition should be denied.

ARGUMENT AS TO WHY THE PETITION SHOULD BE DENIED

I. This Court does not have a jurisdictional basis to hear this case as the decision in this case was based solely upon the application of principles of state contract law.

When a case has been decided by a state court on adequate and independent state grounds, this Court has no jurisdiction to render a decision on the case. *Jankovich v. Indiana Toll Road Commission*, 379 U.S. 487 (1965). As this Court has stated, "Our only power over state judgements is to correct them to the extent that they incorrectly adjudge Federal rights." *Herb v. Pitcairn*, 324 U.S. 117 at 125-126 (1945).

The decision in the present case rests upon adequate and independent state grounds. In ruling on Daniels' claims, the trial court found that the 9.4% surcharge was an additional tariff item, as such term was used in the

contract. Petition at A-4. In addition, the trial court found that Johnson's practice of backing out the 9.4% surcharge from the line haul revenue prior to calculating Daniels' compensation constituted a material breach of the compensation and modification provisions of the contract. Petition at A-4. The trial court reached its decision based upon the application of state contract law.

The Colorado Court of Appeals concurred with the decision of the trial court. The Court of Appeals found that the record supported the findings that the 9.4% surcharge was as additional tariff item. Petition at A-6. The Court of Appeals also found that the backing out of the surcharge from the line haul revenue by Johnson prior to computing Daniels' compensation was a material breach of the compensation and modification provisions of the contract. Petition at A-6 and A-7.

This Court has held that when the decision of a state court rests upon the interpretation of a particular clause of a contract, this Court has no jurisdiction to review the state's courts decision. *Black v. Cutter Laboratories,* 351 U.S. 292 (1956). Such is the situation with which this Court finds itself presented with Johnson's Petition. Johnson is asking this Court to review a decision of a Colorado state court which was based solely on the interpretation of contractual provisions. This Court has no jurisdictional bases to do so.

II. Johnson was warned that unless it modified its contract with Daniels, the provisions of such contract would necessitate the payment of "dual compensation" to Daniels.

When Ex Parte 311 was written, its drafters recognized that, as a result of compliance with its provisions,

dual compensation of those owner-operators (such as Daniels) who were paid on a percentage of revenue basis would result. The dual compensation would arise if carriers charged to shippers a surcharge to provide the funds for the cents per mile payments required by Ex Parte 311, and then rolled such surcharges into the line haul revenue. Owner-operators would receive as compensation the applicable percentages of both the line haul revenue and the surcharge. In addition, Ex Parte 311 required the carrier to pay to the owner-operator the mandated cents per mile funded by the surcharge. In short, pursuant to a percentage of revenue contract, the owner-operator would receive both the full surcharge pursuant to Ex Parte 311 and a percentage of the surcharge, as contractually required compensation. Hence the dual compensation problem.

As a method of avoiding dual compensation, Ex Parte 311 advised carriers to modify their contracts with the owner-operators to allow the carrier to back out the surcharge from the line haul revenue before calculating the owner-operator's compensation. The Interstate Commerce Commission amplified their recommendations on modifying contracts by stating that unless the contracts were modified to specifically allow a back out of the surcharge, the carrier could not back out the surcharge prior to calculating compensation. The Interstate Commerce Commission stated that "Unless (and until) such revisions were made in the leases, owner-operators would receive both the cents per mile payment . . . and a percentage of the fuel-related increases folded into the carrier's rates." The *ICC publication,* question 18 at page 4. See also, the *ICC publication,* question 19 at page 5.

The trial court found that Johnson, as an agent for UVA, was warned by UVA of the dual compensation problem presented by Ex Parte 311. Petition at A-2. In addition, the trial court found that Johnson was advised by UVA to consider modifying its contract with the owner-operators in its employ, as was recommended by the Interstate Commerce Commission, to avoid paying dual compensation.

Johnson never modified the contract to allow Johnson to back out the surcharge prior to calculating Daniels' compensation. Johnson unilaterally backed out of the line haul revenue the 9.4% surcharge prior to calculating Daniels' compensation. Petition at A-4 and A-5; Petition at A-6. Such was a violation of the provisions of the contract concerning compensation and concerning the requirements for modifying the contract. Petition at A-4 and A-5. Such unilateral action by Johnson also violated Interstate Commerce Commission requirements and was in direct contravention of advice received by Johnson from UVA. Petition at A-4 and A-5.

Johnson states that "The decision below allowing Daniels the total 9.4% of the additional line haul revenue conflicts with the regulation." Petition at A-5. Such statement infers that Ex Parte 311 specifically barred dual compensation. Such is not correct. Ex Parte 311 specifically warned that unless contracts between carriers and owner-operators paid on a percentage of revenue basis were modified, dual compensation would result.

The only reason for the enactment of Ex Parte 311 was to provide reimbursement to owner-operators for their fuel costs in excess of 63.5 cents per gallon. Ex Parte 311

was silent on the dual compensation issue except to provide a warning that such issue would arise in cases of owner-operators compensated on a percentage of revenue basis. Ex Parte 311, 46 Fed. Reg. 50072. Any statement that Ex Parte 311 either implicitly or explicitly bars dual compensation or double recovery is false.

III. The two cases cited by Johnson as being in conflict with the decision in the present case are clearly distinguishable and are not in conflict.

Johnson states that its Petition should be granted by claiming that the case of *Central Forwarding, Inc. v. I.C.C.*, 698 F.2d 1266 (10th Cir. 1983) (hereinafter *Central Forwarding*) is in conflict with the decision in the present case. Petition at 5. While not specifically stating so, the implication is that such allows the granting of Johnson's Petition under Sup. Ct. R. 17.1(b).

The court in *Central Forwarding* found that the Interstate Commerce Commission had exceeded the statutory authority granted it by Congress in promulgating Ex Parte 311. *Central Forwarding*, 698 F.2d at 1271. Accordingly, the court vacated the orders promulgating Ex Parte 311. *Central Forwarding*, 698 F.2d at 1285.

The court in *Central Forwarding* was explicit in stating that its ruling would have no effect on actions taken pursuant to Ex Parte 311 prior to the date of the decision in *Central Forwarding*. The court in *Central Forwarding* stated:

> "*The judgement intends no retroactive effect.* The regulation allowed carriers to fold into their rates charged to shippers the surcharge that existed under the previous surcharge program, *and this judgement*

does not require the fold-ins that took place during a transition period to be undone."

Central Forwarding, 698 F.2d at 1285. Emphasis added.

The present case concerns actions taken by Johnson in the period from April 13, 1982 through November 22, 1982. Petition at A-1 and A-2. *Central Forwarding* was decided on February 28, 1983. *Central Forwarding,* 698 F.2d at 1266. Pursuant to the specific holding of the court in *Central Forwarding* cited above, the decision in *Central Forwarding* cannot affect the relationship between Johnson and Daniels, as such relationship ended prior to February 28, 1983. Petition at A-2.

The question addressed in *Central Forwarding* was whether or not the Interstate Commerce Commission had exceeded its statutory authority in promulgating Ex Parte 311. The questions addressed by the state courts in the present case concerned whether or not Johnson had breached certain provisions of the contract. Under no circumstances can the decision in the present case be found to be in conflict with the holding in *Central Forwarding.*

Johnson cites as a second case whose holding is in conflict with holding in the present case *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Dixie Transport Co., et al.,* 1984 Federal Carriers Cases, Para. 37,109 (I.C.C. Rev. B. June 30, 1984) (hereinafter *International Brotherhood*). *International Brotherhood* was not decided by a federal appellate court or a state court of last resort. It was, in fact, decided by an administrative law judge and was affirmed by a review board. *International Brotherhood,* Para. 37,109 at page 47,360. As such *International Broth-*

erhood does not fall under the general criteria for granting a Writ of Certiorari as set forth in Sup. Ct. R. 17.1. Of far greater import, however, is the fact that *International Brotherhood* and the present case were decided on different grounds and thus are not in conflict.

In *International Brotherhood* the administrative law judge interpreted the requirements of surcharge orders enacted by the Interstate Commerce Commission prior to the enactment of Ex Parte 311. The original decision in *International Brotherhood* was handed down on April 22, 1981. *International Brotherhood*, Para. 37,109 at page 47,360. The effective date of Ex Parte 311 was April 13, 1982. Petition at A-1.

Even had *International Brotherhood* concerned the provisions of Ex Parte 311, its decision is not in conflict with the decision in the present case. The plaintiffs in *International Brotherhood* were claiming that the pertinent Interstate Commerce Commission regulations required the carriers to pay to the owner-operators 100% of any surcharge amount. The administrative law judge in *International Brotherhood* disagreed and held that the pertinent Interstate Commerce Commission regulations required only that the owner-operators be reimbursed for their fuel costs in excess of 63.5 cents per gallon. *International Brotherhood*, para. 37,109 at page 47,361.

In the present case Daniels did not claim that Johnson had misapplied the provisions of Ex Parte 311. What Daniels claimed was that Johnson failed to distribute the monies generated by Daniels in accordance with the provisions of the contract. *International Brotherhood* and

the present case are clearly distinguishable and are not in conflict.

CONCLUSION

For the above reasons Respondent Edward H. Daniels would respectfully request that Johnson's Petition for a Writ of Certiorari be denied.

December, 1988

Respectfully submitted,

PAUL KRAM
MARK A. FROGGE
LAW OFFICES OF PAUL KRAM
3131 South Vaughn Way
Suite 105
Aurora, Colorado 80014
(303) 752-1030

Attorney for Respondent